

## **SUMMARY OF TRUST MANAGEMENT PROBLEMS, NEED FOR ACTION AND SPECIAL TRUSTEE'S STRATEGIC PLAN RECOMMENDATIONS**

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### **SUMMARY**

The Special Trustee for American Indians proposes a single organization which will manage the U.S. Government's trust responsibilities to American Indians and American Indian Tribes for trust resource management, trust funds management and land title and records management (collectively, trust management activities).

This will involve consolidating trust management activities into a single, independent institution with its own management structure to assume the responsibility for the reforms identified in the Strategic Plan, to implement the reforms over a two year period and to provide for the ongoing management of the U.S. Government's trust responsibilities to American Indians for trust management activities. The institutional unit should be organized by business line or function and should be dedicated exclusively to trust management activities. The institutional unit should be managed by a full time Chairman and Chief Executive Officer (CEO) and a Board of Directors appointed by the President and confirmed by the Senate.

The unit's proposed organizational form is an independent Government Sponsored Enterprise (GSE) subject to Congressional oversight. The unit's generic name is referred to throughout the Strategic Plan as the American Indian Trust and Development Administration (AITDA).

The proposal would represent a major change in the way the U.S. Government manages its trust responsibilities to American Indians. It would for the first time clearly differentiate trust management activities that arise from the trust management of American Indian Tribal and individual lands and natural resources such as lease approvals and monitoring, timber sales, managing land, oil, gas, timber, and other trust assets; collecting, depositing, investing and disbursing funds derived from the Indian lands and Indian economic activities; and managing the land title and ownership records from those other activities that fall under what the courts have called the general trust responsibility, such as education, housing, welfare programs of all types, law enforcement and other American Indian services provided by the Federal Government.

Generally, the Strategic Plan also proposes, directly and indirectly, that all policies, procedures, systems and practices for trust management activities meet at a minimum the regulatory standards and best practices of national bank trust departments and companies. These modern regulatory standards are based on Anglo-American principals of trust law which have developed over the past several centuries. These standards are guided by, regulated, supervised and enforced by the U.S. Office of the Comptroller of the Currency (OCC). It is proposed that OCC regularly examine and supervise AITDA in much the same way OCC conducts examination and supervision of national bank trust departments. Similarly, the trust powers and account administration flexibility for various types of investments are also modeled after the powers and fiduciary flexibility available to national bank trust departments. In short, the American Indian trust beneficiaries will be receiving equivalent trust services to those trust services provided by the national bank trust departments to their trust customers. These private sector standards are proven, efficient and effective. Notably, no national bank since the 1930s has failed because of losses taken by bank trust departments and companies.

The reforms just noted and the other reforms identified in the Strategic Plan are urgently needed. The principal causes of the long standing trust problems have resulted in conditions which are unacceptable by any reasonable standards and continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private. The failure of the trustee to perform its fiduciary duties in a manner consistent with accepted fiduciary standards represents a significant potential financial liability for the Federal Government as well as damage to its reputation for its failure to act in a responsible manner.

So long as the organization and management of the trust management activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. For these reasons, the Special Trustee believes that the Department of the Interior and the Bureau of Indian Affairs (BIA) do not have and will not have the financial and managerial resources to undertake and implement the reforms proposed by the Strategic Plan.

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### **Special Trustee's Assessment and Need for an Independent Administration of Trust Management Activities**

The problems in the trust management systems are longstanding ones. Mismanagement and neglect have allowed the trust management systems, record keeping systems and risk management systems to deteriorate over a 20 to 30 year period and become obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously under staffed and under funded. The result was that the government increasingly was unable to keep pace with the rapid changes and improvements in technology, trust systems and prudential best practices taking place in the private sector trust industry. This gap continues today and will continue to increase until the reforms outlined in the Strategic Plan are funded and implemented.

There are four principal causes of the mismanagement and neglect which have contributed to the trust management problems both currently and in the past:

1. The primary cause of the trust management problems both historically and currently can be attributed to the trade-offs of financial and managerial resources which take place at every level of government between trust management activities (trust resource management, trust funds management and land title and records management) and other activities and programs of the Bureau of Indian Affairs, the Department of the Interior, the Administration and the Congress. History has consistently shown these politically expedient government trade-offs of competing financial and managerial resources to be adverse and detrimental to the effective and proper administration and funding of the trust management activities.

These trade-offs have been made and are continuing to be made even in the face of a long history of court cases which have consistently held the trust relationship between the United

States and the American Indians to be a distinctive one. Decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

A trustee is not and should not be relieved of his duties, responsibilities and accountability to trust beneficiaries because the trustee lacks the financial and managerial resources to administer the trusts. To be so relieved for this reason is not acceptable for a private trustee. Yet, the most frequently cited reason and excuse for the Federal Government's historical and continued failure to address and resolve the longstanding trust management problems and, by so doing, to fulfill its trust responsibilities is the lack of funding and staffing for the American Indian trust management programs. While most certainly the lack of financial and managerial resources is the primary causal factor for the Federal Government's failure in this regard, under no circumstances should it also serve as an acceptable excuse for the continued neglect of the Federal Government's trust responsibilities to American Indian trust beneficiaries. Yet, this is exactly the case for the executive and legislative branches of the Federal Government. Lack of financial and managerial resources has become the standard and institutionally acceptable excuse for the Federal Government's continued failure to address and resolve the trust management problems. Because it is by now a well established standard and acceptable excuse, no one and no government management unit has been or is likely to be held accountable for this neglect at any level of the Federal Government. This is a policy of political and self-serving convenience and not one worthy of a Federal trustee who has charged itself with moral obligations of the highest responsibility and trust or one to be judged by the most exacting fiduciary standards. In addition, this policy of political and self-serving convenience not only facilitates and perpetuates the neglect of the American Indian trust management programs but continuously adds to it. This is because it is convenient, easy and politically desirable to make even more choices and trade-offs detrimental to the American Indian trust management activities in favor of other government programs which are politically more popular. All with the knowledge that the most the Federal Government or individuals making the choices and trade-offs will suffer from such behavior is some criticism from American Indians and their supporters. No real accountability will be exacted in the near or medium terms and if it is, it will be by the judicial branch of the Federal Government over the long term. The Strategic Plan proposes that the Federal Government provide sufficient financial and managerial resources to ensure that it can meet its trust responsibilities to the American Indians.

2. Another important cause of the trust management problems is the way the BIA is organized and manages trust management activities. The BIA's organizational alignment causes decision-making and management for Individual Indian Money (IIM) and Tribal issues to be an intricate and complex coordination process and an ineffective one at times. Responsibilities fall within 16 separate organizations all reporting directly to one entity, who has direct line authority for every other Bureau organization and program. Further, the activities are carried out by over 100 field offices. The BIA's organizational structure prevents in many instances informed and expeditious decisions because of the number of entities involved and the large number and complexity of the decisions their activities generate. That structure also results at times in trust management responsibilities of a higher order not receiving the attention and focus they deserve and/or being traded off against other Bureau priorities of a lower order, which are erroneously considered to be more important than trust management. The BIA offices must expend significant resources to coordinate with managers, supervisors and staff across the Bureau to obtain cooperation. Coordination and cooperation often breaks down. Field offices often manage their operations

autonomously with little discipline and control being exerted or enforced at either the local, area or Washington administrative levels. Further, because the BIA is not organized and managed by function, all too often policies and procedures written for specific trust programs or functions are not universally followed because the staff that perform the activities take their direction from general managers in area or field offices, not the trust program offices. Nor can discipline, control and accountability be enforced by a good management assessment and audit system since standardized policies, procedures and practices are rare and insufficient financial and managerial resources are provided for audit and risk management of any type. The Strategic Plan proposes a single unit organized along business lines to resolve these issues.

3. The two causes just described acting together over many years have resulted in a third causal factor for the longstanding trust management problems: lack of competent managerial resources to manage effectively and efficiently the trust management responsibilities to the American Indians. Managers and staff of the BIA have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices which are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, and the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and even assuming adequate financial resources were made available, they are not capable of managing effectively and efficiently the Federal Government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized over many years and are now inherent in the BIA organizational culture. It is the reason in large part:

- Why the BIA has never originated meaningful reforms of the trust management processes in the last 25 years.
  - Why the BIA has resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 25 years.
  - Why a new organizational structure, new management and massive re-training are necessary for the future management of the Federal Government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Strategic Plan.
4. Another fundamental problem is fractionation of American Indian Allotment interests. The vast majority of accounting, basic record keeping and other operating problems affecting trust resource management, trust funds management and trust land records and ownership management originate from one source: the ever increasing fractionation of undivided realty interests owned by Individual American Indian allottees.

Fractionation is a direct result of the Federal Government's policies and laws relating to lands owned by American Indians back to at least 1887.

As originally envisioned in the late nineteenth century, allotments were to be held in trust by the United States for their Indian owners no more than 25 years, after which the land would be conveyed in fee simple to its Indian owners. Many allottees died without wills during the 25

year trust period, and it also became evident that many allottees continued to need Federal protection. Consequently, Congress enacted limited probate laws and authorized the President to extend the trust period for those individuals who were not competent to manage their lands. The presumption was, however, that at some point in the foreseeable future the lands would be conveyed to their Indian owners free of Federal restrictions. Nevertheless, Congress continued to extend the period of trust protection but did not amend the probate laws. Under the Indian probate laws, as individuals died, their property descended to their heirs as undivided fractional interests in the allotment. As the years passed, fractionation has expanded geometrically to the point where there are hundreds of thousands of tiny fractional interests. These fractional interests have nominal economic value but pose an enormous cost burden estimated at about \$33 million per year on the Federal Government's trust management activities.

Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA) in 1984. The ILCA authorized the buying, selling and trading of fractional interests, but most importantly it provided for the escheat to Tribes of interests of less than two percent. 55,000 of the two percent-or-less fractional interests have escheated since 1984, but the fractionation problem continues to worsen. Moreover, the 1997 *Youpee vs. Babbitt* Supreme Court decision called into question the legality of the escheated property since 1984, further complicating the fractionation problem. Maintaining the heirship and land records and administering the land is inordinately expensive, and the administration of the records pertaining to the money earned by each individual allottee is equally expensive and difficult. In addition, utilization and conveyance of the fractionated property by the numerous owners is difficult because of the need to secure the numerous consents required. Finally, the difficulty in dealing with the fractionated interests often effectively precludes the highest and best use of the land for economic development and the maximization of investment income, thus diminishing its economic value.

Legislation is therefore needed which would consolidate the large number of existing fractionated interests and prevent further fractionation. This alone would remove a primary obstacle to the efficient administration of the trust management systems and provide a major catalyst for the timely resolution of most of the operational problems associated with trust management activities, including trust resource and realty management, probate, land titles and ownership records management, IIM accounting, collections, deposits, investments and disbursements, customer service and record keeping for all trust management activities. An added benefit is the annual administrative cost savings estimated at the same \$33 million mentioned above.

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## **Conclusion of Assessment**

These principal causes of the trust management problems have resulted in conditions which are unacceptable by any reasonable standards and continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private.

So long as the management and organization of the trust management activities remain status quo and

as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. For these reasons, the Special Trustee believes that the Department of the Interior and the BIA do not have and will not have the financial and managerial resources to undertake and implement the reforms proposed by the Strategic Plan.

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### **Special Trustee's Recommendations**

To resolve the long standing trust management problems, the Special Trustee recommends as follows:

1. That the American Indian Trust and Development Administration be approved and be provided with the financial and managerial resources to manage the U.S. Government's trust management responsibilities to American Indians and American Indian Tribes for Trust Resource Management, Trust Funds Management and Land Title and Records Management according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.
  2. That all the reforms identified in the Strategic Plan be approved, funded, staffed and implemented.
  3. That all trust management duties, responsibilities, budgets and activities, including Trust Resources Management, Trust Funds Management and Land Title and Records Management, carried out by the Bureau of Indian Affairs and the Department of the Interior should be transferred to the AITDA as soon as practical and before full implementation of the Strategic Plan reforms.
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### **Strategic Plan Requirements**

Section 303 of the American Indian Trust Fund Management Reform Act of 1994 (Public Law 103-412) (Reform Act) requires a Comprehensive Strategic Plan:

#### **(a) COMPREHENSIVE STRATEGIC PLAN.--**

1. In General.--The Special Trustee shall prepare and, after consultation with Indian Tribes and appropriate Indian organizations, submit to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate . . . a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian Tribes and individual Indians in compliance with this Act.
2. Plan Requirements.--The plan prepared under paragraph (1) shall include the following:
  - o Identification of all reforms to the policies, procedures, practices and systems of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management

Service (MMS) necessary to ensure the proper and efficient discharge of the Secretary's trust responsibilities to Indian Tribes in compliance with this Act.

- Provisions for opportunities for Indian Tribes to assist in the management of their trust accounts and to identify for the Secretary options for the investment of their trust accounts, in a manner consistent with the trust responsibilities of the Secretary, in ways that will help promote economic development in their communities.
- A timetable for implementing the reforms identified in the plan, including a date for the proposed termination of the Office.

The Strategic Plan has been prepared by the Special Trustee of American Indians to meet the requirements of the Reform Act.